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IN THE

Supreme Court of The United States

OCTOBER TERM, 1965

JAMES O. PHIPPS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The following Brief is submitted in opposition to the petition of James O. Phipps praying for a Writ of Certiorari to be issued by the Supreme Court of the United States to review the judgment of the Supreme Court of the State of Ohio entered in the case of State of Ohio vs. James O. Phipps May 12, 1965, and denying a motion for rehearing on June 23, 1965, being Case Number 39361.

STATEMENT OF THE CASE

The statement of the case as set forth by counsel for petitioner is substantially correct insofar as it relates to the matters set forth as the basis for the requested writ.

ARGUMENT

The petitioner presents his argument in two segments, to-wit:

I. If the petitioner was convicted and sentenced upon an indictment returned by a grand jury which was not legally constituted, was he deprived of due process of law?

II. If so, was the grand jury in question legally constituted?

We concur with petitioner's answer to the first question, in that if the petitioner was convicted and sentenced upon an indictment returned by a grand jury which was not legally constituted, he would have been deprived of due process of law. In fact, the overwhelming weight of relevant authority would seem to have obviated this as a controvertible question of law.

The only question, therefore, that need be considered is, "Was the grand jury legally constituted?"

Petitioner has supplied the Court with a copy of Ohio Revised Code Section 2939.17, and rests his case on the fact that the Court, in the entry dismissing the regular grand jury, used the term, "discontinued," rather than the word, "discharged," as used in that Section.

Actually, the special grand jury was not impanelled under authority of Ohio Revised Code Section 2939.17, and the provisions of that Section have no bearing on this appeal.

The special grand jury was impanelled by the Court under the provisions of Ohio Revised Code Section 2939.04, dealing with Grand Jurors, which provides, in part, "The Court of Common Pleas may order the drawing of a special grand jury to sit at any time public business requires it." (See Appendix A for full text of statute.)

A stipulation entered into by the parties which is included by petitioner in his Brief as "Appendix F" provides in

part: "It is further stipulated that said action of the Honorable Lowell C. Thompson was taken pursuant to the authority obtained in Section 2939.04 of the Revised Code of the State of Ohio. It is further stipulated that the above action and order of Judge Thompson was pursuant to his finding that a Special Grand Jury was required due to the needs of the public business, that is to investigate and examine all matters relating to charges against the Office of the Chief of Police of the City of Portsmouth, Ohio, and all matters which may come to its attention. It is further stipulated that the above may be included in the Bill of Exception to be hereafter filed in this cause."

The Court impanelled the special grand jury in this instance because it was believed that investigation of charges against the Chief of Police of the City of Portsmouth, Ohio, and related matters, would be extremely time-consuming, and would constitute an undue burden on the members of the regular grand jury. The records of the Court support this, in that the special grand jury remained in constant session for a period of fourteen days.

It is therefore respectfully submitted that the reliance upon the use of the term "discontinued" instead of "discharged" has no relevancy to this proceeding.

The Court of Common Pleas acted under the direct statutory authority contained in Ohio Revised Code Section 2939.04. At the time of impanelling the special grand jury the Court specifically found that such action was required, "due to the needs of public business."

Petitioner does not contend that the special grand jury was irregularly summoned. As he states in his Brief on page 3, the Court ordered the Clerk to summon the same by drawing from the jury wheel the names of sixteen persons to serve as a special grand jury. This was a departure

from former practices, and resulted in the passage by the Ohio Legislature of Revised Code Section 2939.02, (effective August 5, 1963) which now makes it mandatory for all grand jurors to be selected by means of the jury wheel. See Appendix B.

All of the cases cited by petitioner deal with matters not relevant to the appeal, with the exception of two, which might possibly be misconstrued as having a bearing on the facts of this case. Although the printed syllabus in the case of *State vs. Weible*, 25 ONP (NS) 565, decided October, 1925, by the Court of Common Pleas of Summit County, Ohio, appears to support petitioner's position, it in fact does not. On page 10 of his Brief, petitioner states: "In this regard, it has been held also that a challenge to a special grand jury should be sustained where it appeared that immediately after the regular grand jury was discharged a special grand jury was called because the prosecuting attorney felt that some cases he had to present might be more favorably considered by a new jury than they would be by the regular grand jury." A closer examination of the case reveals that, 1) The Court was there concerned with the interpretation of specific statutory provisions not involved in this appeal; and, 2) The Court specifically found as stated on page 571, "The record does not disclose that the men constituting the special grand jury were served or called by the sheriff of the county, from the bystanders and neighboring citizens, as provided by law; and, as far as the record discloses, there was no legally constituted grand jury; and, as far as this Court knows from the record, there was no grand jury."

Similarly, in the case of *United States of America v. Wallace and Tiernan, Inc., et al.*, 234 Fed. Suppl. 780, cited on page 8 of petitioner's Brief, the District Court in making

the determination that the special grand jury "was not summoned according to stautory mandate, but was illegally constituted," did so by reason of its finding that specific requirements of the Criminal Code and the Federal Rules of Criminal Procedure were not adhered to, to-wit, the requirement that "only the Chief Justice, or in his absence, the presiding judge, may actually exercise the authority."

In the instant case, the judge acted under specific statutory authority, and no violation of this authority is set forth by the petitioner.

Petitioner raises one other question, one which was the principal issue raised by him unsuccessfully in all prior proceedings in the Court of Common Pleas of Scioto County, Ohio, the Fourth District Court of Appeals of Ohio, and the Supreme Court of Ohio, to-wit: Can one of the judges of a two judge Court of Common Pleas summon a special grand jury? Again he has referred to the wrong section of the Ohio Revised Code. The grand jury in this case was, as previously noted, summoned pursuant to the provisions of Section 2939.04, *not* Section 2939.17 of the Ohio Revised Code. The Court of Appeals disposed of the contention as set forth in petitioner's Brief, Appendix A, on page 14 and 15, which concludes, "In our opinion, the official act of an individual judge of a Common Pleas Court composed of more than one judge is the act of the court; that it was never contemplated and is not necessary that a judge of such court would be required to confer with and have the concurrence of the other judge or judges in the performance of his judicial duties." This was the major issue which petitioner raised in the Supreme Court of Ohio.

By reason of the foregoing, it is respectfully submitted that the special grand jury which is the subject of this appeal was legally summoned pursuant to the laws of the

State of Ohio, and was a legally constituted and valid grand jury.

Since no contention is made by petitioner that the grand jury in question was not fairly and legally constituted; that no effort was made to select persons for the panel by some discriminatory means in order to prejudice his rights, it is further submitted that no issue is here raised involving the deprivation of the petitioner's liberty without due process of law; and that the nature of the matters complained of would involve no substantive question of law, the Supreme Court of Ohio having duly considered and passed judgment upon all procedural issues raised relative to the impanelling of the grand jury in question.

CONCLUSION

It is respectfully submitted that the petitioner's rights have not been abridged by the State of Ohio, and it is therefore reqested that this appeal be denied.

Respectfully submitted,

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APPENDIX A

Page's Ohio Revised Code, Section 2939.04 Grand Jurors; compensation.

The compensation of grand jurors is the same as that prescribed for petit jurors by section 2313.34 of the Revised Code. Except in counties of less than one hundred thousand population according to the last federal census, in which counties the judge of the court of common pleas shall make rules and regulations thereto, a person who has served as a grand juror at a term of court is prohibited from serving again, either as a grand juror or petit juror, in that jury year in which the service is rendered, or in the next jury year. He is entitled to a certificate of exemption in like manner as a petit juror. The court of common pleas may order the drawing of a special jury to sit at any time public business requires it.

APPENDIX B

Page's Ohio Revised Code, Section 2939.02. Selection of Grand Jury.

Grand juries shall consist of fifteen persons, resident electors of the county. Persons to serve as grand jurors in the court of common pleas of each county shall be selected from the persons whose names are contained in the annual jury wheel, as prescribed by sections 2313.07, 2313.08, and 2313.35 of the Revised Code. At the time of the selection of the persons who are to constitute the grand jury, the commissioners of jurors shall draw from the jury wheel ballots containing the names of not less than twenty-five persons. The first fifteen persons whose names are drawn shall constitute the grand jury, if they can be located and served by the sheriff, and if they are not excused by the court, or a judge thereof. In the event any of the first fifteen persons whose names are so drawn are not located or are unable to serve and are therefore excused by the court or by a judge thereof, whose duty it is to supervise the impaneling of such grand jury, such judge shall then designate the person whose name next appears on the list of persons drawn, to serve in the place of the person not found or excused and shall so continue to substitute the names of the persons drawn in the order in which they were drawn, to fill all vacancies resulting from persons not being found or having been excused by the court or the judge thereof, until the necessary fifteen persons are selected to make up the grand jury. In the event that all of the names appearing on the list of persons drawn are exhausted before the grand jury is complete, the judge shall order the commissioners of jurors to draw such additional names as the judge determines, and shall proceed to fill such vacancies from such names in the order in which they were drawn.

The judge of the court of common pleas may select any qualified elector, whose name is not included in the annual jury list or on a ballot deposited in the jury wheel, to preside as foreman of the grand jury, in which event the grand jury shall consist of the foreman so selected and fourteen additional grand jurors selected from the jury wheel in the manner provided in this section.

END